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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 598

ORIE FLOYD BAKER,

Petitioner,

J. C. TAYLOR, Warden, United States Penitentiary, Leavenworth, Kansas,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

ROBERT F. MOORE
Counsel for Petitioner

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vs.

J. C. TAYLOR, Warden, United States Penitentiary, Leavenworth, Kansas,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

(And brief in support thereof).

To: THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Orie Floyd Baker, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this case, October 19, 1960 (as per case #6362—Tenth Circuit Court of Appeals).

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The Court of Appeals for the Tenth Circuit, on October 19, 1960 reversed the Judgment of the United States District Court for the District of Kansas—entered on 28 of December, 1959 and ordered the cause remanded, with direction to deny the petition for a writ of habeas corpus and restore petitioner to the custody of the Warden. (App. 6a)

A petition for rehearing made by the petitioner, Orie Floyd Baker, through his attorneys Robert F. Moore and Robert F. Meersman, was duly entertained, and on November 10, 1960 the Court of Appeals denied Petition for Rehearing. (App. 6a)

A Motion for stay of Mandate, made by the petitioner, Orie Floyd Baker, through his attorneys Robert F. Moore and Robert F. Meersman, was duly entertained and on November 21, 1960, an Order was entered by the Court of Appeals, staying its mandate for a period of thirty (30) days.

This petition is filed within thirty days from the date of the entry of the Order staying the Mandate.

Proceedings towards the surrender of the petitioner have been stayed until the final disposition by this Court.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Kansas, is reported as (R. page 13).

The opinion of the United States Court of Appeals for the Tenth Circuit has not yet been reported and is printed in the record, at pages (App. 3a to 6a). The opinion on

rehearing has not yet been officially reported and is printed in the record at page (R. 14). The Order staying the mandate of the Court of Appeals is printed in the record—(R. 14).

STATEMENT OF THE MATTER INVOLVED.

The judgment of the Court of Appeals sought to be reviewed: reversed a judgment in the District Court for the District of Kansas, granting a Writ of Habeas Corpus and ordering conditional release of petitioner.

The Appellant contended there shall be no concurrency of sentencing by a District Court Judge, and Appellee presented the question that the sentencing court did not intend that this sentence of the petitioner herein, be served concurrently with the later imposed sentences of Indiana and Wisconsin. The petitioner herein contends, as the records show, he was at the imposition of the Federal Sentence, *under sentence from the State of Arkansas only,* and the Federal Trial Judge through his pronouncement of sentence, did expressly exclude the then existing State of Arkansas sentence: Since the trial judge knew of the detainers lodged with the State of Arkansas by the States of Indiana and Wisconsin, but bearing in mind there existed no sentences from these states at this time, the Trial Judge did sentence the petitioner here:

> "* * * it is the judgment and sentence of the court that you be committed to the custody of the Attorney General to be confined to an institution to be designated by him for a period of five years, *to begin at the expiration of the present sentence that you are now serving in the Arkansas State Penitentiary*" (Emphasis ours) (R. pages 13-14)

This was the only valid state sentence against this petitioner at that time and to expressly exclude any question

of concurrency with the then existing Arkansas state sentence, the trial judge imposed the sentence noted above.

Thereafter at the termination of the Arkansas sentence, the United States Marshal, as agent of the Attorney General failed to follow the mandate of the United States District Court and did allow petitioner to be returned to Indiana and subsequently to Wisconsin. The appellee proffered numerous cases tending to show the Attorney General in his purely ministerial acts, may not look past the mandate of the Court in these matters.

The District Court which granted the Writ of Habeas Corpus felt the Attorney General should have followed the mandate of the trial Court and the petitioner's sentence was to commence at the expiration of the Arkansas sentence, as the trial Court ordered, and therefore ordered Writ of Habeas Corpus to issue. The Court of Appeals reversed, and remanded, with direction to restore petitioner herein to custody of the Warden. Apparently the Court of Appeals considered the statute (18 U.S.C. 3568) involved and failed to consider the non concurring of sentencing question or the factor of the duty of the Attorney General or his agent to follow the mandate of the Court.

QUESTION INVOLVED.

1. If the Attorney General has a duty to act diligently and expeditiously where there exists a unequivocal and direct mandate from a Court of proper jurisdiction directing him to act, where his failure to act causes subsequent hardship on petitioner?

2. Whether the failure of the Attorney General to follow and utterly disregard the mandate of a Federal District Court, and in effect surrenders a prisoner from his jurisdiction to the jurisdiction of one of the States

for Judicial processes in that State, is in effect acquiescence on the part of the Attorney General to allow the prisoner, under a prior Federal sentence, to serve that Federal sentence, with the later to be decided State sentences, under 18 U. S. C. 4082 and 3568?

3. Did the Court of Appeals err in the reversing the Order of the United States District Court for Kansas, granting a Writ of Habeas Corpus, by interpreting the statute 18 U. S. C. 3568 in an apparent vacuum and not considering any duty of the Attorney General to act to fulfill the valid mandate of the United States District Court as set out in its sentence?

STATUTES INVOLVED.

18 U. S. C. 3568 Provides:

Effective Date of Sentence.—The sentence of imprisonment of any person convicted of an offense in a Court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.

If any such person shall be committed to a jail or other place of detention to wait transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

18 U. S. C. 4082 Provides:

Commitment to Attorney General: Transfer.—Persons convicted of an offense against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General of

the United States or his authorized representative, who shall designate the places of confinement where the sentences shall be served.

The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted.

The Attorney General may order any inmate transferred from one institution to another.

The authority conferred upon the Attorney General by this section shall extend to all persons committed to the National Training School for Boys.

REASONS FOR ALLOWANCE OF THE WRIT.

1. Each of the questions presented herein embody questions of Federal Law, which have not been, but should be settled by this court.

2. The decision herein is at variance and in conflict with the decision of United States Court of Appeals for the Ninth Circuit in *Smith* v. *Swope* (91 Fed. (2d) 260), holding a United States Marshal's failure to follow the valid mandate of a District Court as to the sentence therefrom, and who surrenders a prisoner to a State jurisdiction for a later trial and sentence in the State; and on release from that State, then to commence service of the Federal sentence; allows the Marshal "authority not given to the Courts of Justice", and thereby permits a ministerial officer to commit an injustice against a prisoner, because of his neglect or failure to act.

The Court of Appeals avoided the question of the duty of the Attorney General or his agent to fulfill his simple ministerial duty as directed by the trial Court.

3. That the questions presented to this court are of great and recurring significance in the administration of Justice by the Federal Courts and should be decided in its final analysis by this Honorable Court.

WHEREFORE:

Petitioner respectfully prays that a Writ of Certiorari be issued out and under the seal of this Honorable Court, directed to the Court of Appeals for the Tenth Circuit, commanding that Court to certify and send to this Honorable Court for its review and determination on a day certain, to be therein named,—a full and complete transcript of the proceedings of that Court herein being the case #6362, and entitled in its docket as J. C. Taylor, Warden, United States Penitentiary, Leavenworth, Kansas, Appellant vs. Orie Floyd Baker, Appellee and that the judgment of that court be reviewed by this court, and that for such other relief as this court may seem proper.

Dated: December 19, 1960

Orie Floyd Baker
By Robert F. Moore
Attorney for Petitioner

Robert F. Meersman
with him on Petition

STATEMENT OF FACTS.

On June 14, 1955, following his plea of guilty to indictments charging violations of 18 U. S. C. 500 (uttering forged post office money orders) 18 U. S. C. 1708 (mail theft), and 18 U. S. C. 495 (forging an endorsement to a United States treasury check), Petitioner was sentenced by the District Court for the Eastern District of Arkansas, Western Division, in Criminal cases No. 15758, 15759, and 15765, to be committed to the custody of the Attorney General for a period of five years in each case, the sentences to be served concurrently (R. page 13).

At the time of sentencing, Petitioner was serving a two-year sentence in the Arkansas State Penitentiary and was before the Federal Court on a writ of habeas corpus *ad prosequendum*. The sentencing judge stated in his order in each of the cases that the sentence imposed was to begin "at the expiration of the sentence said defendant is now serving in the Arkansas State Penitentiary (R. page 13).

Upon his release from the Arkansas penitentiary on December 10, 1955, the Attorney General took no action to follow this valid and substaining mandate. Petitioner was taken into custody by officials of the State of Indiana, for a subsequent hearing of a parole violation pursuant to a detainer which had been filed on March 31, 1954 (R. page 9). After his discharge from the Indiana Reformatory on December 12, 1956, Petitioner was taken into custody by the sheriff of Kenosha, Wisconsin, for subsequent trial conviction and sentencing, pursuant to detainers filed by that state with Arkansas, on March 24, 1956 and Indiana authorities prior to the Federal Detainers (R. page 9) and

United States v. *Baker*, 170 F. Supp. 651, 653, (E.D.Ark. 1959). He was sentenced by the Municipal Court of Kenosha, Wisconsin, to a term of from one to three years in the Wisconsin State Prison. On May 2, 1958, Petitioner was paroled from Wisconsin, and he was the finally committed to the United States Penitentiary at Leavenworth, Kansas, on May 13, 1958, for service of his federal sentence (R. page 10).

Prior to the present proceeding, Petitioner had filed a motion under 28 U. S. C. 2255 (correction of sentence) in the District Court for the Eastern District of Arkansas (*United States* v. *Baker*, 158 F. Supp. 842). The motion was denied on January 31, 1958, primarily because Petitioner was at that time confined in the Wisconsin State Penitentiary. Petitioner filed another motion under 28 U. S. C. 2255 after beginning his confinement at Leavenworth, but this was denied on January 20, 1959. *United States* v. *Baker*, 170 F. Supp. 651 (E. D. Ark.) The denial was affirmed on appeal (*Baker* v. *United States*; 271 F. 2d 190 (C. A. 8, 1959). However the courts above recommended some degree of executive clemency and instituted proceedings to seek Habeas Corpus.

On November 24, 1959, while confined in the Leavenworth Penitentiary, Petitioner filed with the District Court for the District of Kansas a petition for a writ of habeas corpus (R. page 1), in which he asserted that his federal sentence had been served concurrently with the State sentences which he served in Indiana and Wisconsin. In support of his contention, he alleged that the sentencing court stated that the federal sentence was to begin at the expiration of the sentence Petitioner was then serving in the Arkansas State Penitentiary (R. page 5). Because of the inactivity and negligence of Attorney General in not taking custody of the Petitioner was an acquiescence on the Attorney General's part to allow federal sentence to be served in a State Institution.

If Petitioner's sentence commenced to run on December 10, 1955 and if he were credited with the maximum statutory good time of 480 days, he would have been eligible for conditional release on August 17, 1959 (R. page 16). If his sentence were computed from May 2, 1958, the date on which he was released from Wisconsin State Prison, he would be eligible for conditional release on January 6, 1962.

The District Court appointed counsel to represent Petitioner (R. page 16): Respondent filed a return to the petition (R. page 17), and the matter was heard on December 8, 1959. The court concluded that the sentencing judge intended that the federal sentence should be served concurrently with any state sentences which followed the Arkansas sentence and ordered Petitioner to be conditionally released on December 28, 1959 (R. pages 18-19).

Thereafter the United States Attorney filed a notice of appeal on February 25, 1960. On March 14, 1960 said United States Attorney did file statements and points relied on and contents of record and filed Brief of Appellant on July 6, 1960, citing jurisdiction under 28 U. S. C. 1291 (R. page 19). Appellee filed his brief September 13, 1960 and on September 16, 1960, oral argument entertained before the Judges of the Tenth Circuit; and on October 19, 1960 decision was entered, remanding cause with direction to order Petitioner returned to custody of Warden (App. 6a).

Thereafter Petitioner filed petition for rehearing on October 31, 1960 (App. 6a). Said motion was duly entertained and denied on November 10, 1960 (App. 6a). Later Petitioner filed a motion for stay of mandate on November 17, 1960 (App. 6a). On November 21, 1960 an order was entered staying mandate for 30 days or until finally decided by this oHnorable Court (App. 6a).

ARGUMENT.

I.

The Attorney General of the United States, or through his agents, has a duty to act diligently and expeditiously where there exists a unequivocal and direct mandate from a court of proper jurisdiction directing him to act, where his failure to act causes subsequent hardship on petitioner.

The pronouncement of the late Honorable Harry J. Lemley of the District Court of Eastern Division of Kansas provided in each of the five year concurrent sentences imposed on petitioner, That:

> "Said sentence to begin at the expiration of the sentence said defendant is now serving in Arkansas State Penitentiary". (R. pages 11-12-13-14)

The trial judge in handing down this sentence did so with full knowledge of all the facts involved. He knew the States of Indiana and Wisconsin had lodged detainers against the petitioner. However, bear in mind the Learned Judge also knew and was mindful of the fact neither Indiana nor Wisconsin had any more than a mere warrant for arrest. He however did render his sentence in the only manner compatible with the Law. He knew definitely the petitioner was to spend a specific term in the Arkansas State Penitentiary. It would have been utter folly for Judge Lemley to specify any other time for commencement of sentence. He surely could not specify it to commence at the termination of Indiana and Wisconsin's sentences for there existed none at that time.

Under the rule of Law stated in *U. S. ex rel. Chastin* v. *Denemark* (258 U. S. 254) it is stated:

> "A sentence in a criminal case should be clear and definite and be so complete as to need no construction of court as to ascertain its impact: It should be so complete that to ascertain its meaning it would not be necessary to supplant the written words by neither a non-judicial or ministered office; he must find what the sentencing judge intended from the language he used".

The sentence above set by Judge Lemley was directly, completly, concisely, legally and finally linguistically within the mandate of the *U. S. ex rel. Chastin* v. *Denemark*. This sentence was so utterly clear to all—that to misinterpret its impact is to simply disregard the same.

To further state our point, let us consider, *Hall, Warden* v. *U. S. ex rel. Wampler* (298 U. S. 460) in which the Learned Justice Cardozo spelled out the pronouncement of the Court.

> "The only sentence known to the Law is the sentence or judgment entered upon the records of the case . . . until corrected in direct proceedings, it says what it was meant to say and this is a non-rebuttable presumption. In any collateral inquiry, a court will close its ears to a suggestion that the sentence is something other than the authorized expression of the sentence of the Judge" . . . also see *United States* v. *Daugherty* (269 U.S. 360) and *King* v. *United Stotes* (98 Fed. (2d) 291).

From the authorities cited—we can not go behind the meaning of the trial court's sentence to attempt to seek out the judge's hidden intention. The trial court could not foresee with any degree of certainty any sentence of Petitioner in Indiana and Wisconsin or for that matter, some

third or fourth State that may later try the petitioner before the Attorney General should finally decide to act.

Therefore, in a final statement concerning the sentence of Judge Lemley, it was direct, clear, concise, legal and lawful and therefore was to be followed by the Attorney General, since any act of the Attorney General in this matter is purely ministerial and not discretionary.

The United States Court of Appeals for the Ninth Circuit in its case *Smith* v. *Swope, Warden* (91 Fed. (2d) 260) stated, concerning the duty of the Attorney General to act in his ministerial capacity as follows:

> "The least to which a prisoner is entitled is the execution of the sentence of the court to whose judgment he is duly subject. If a ministerial officer, such as a marshal, charged with a duty to execute the court orders, fails to carry out such orders, that failure can not be charged up against the prisoner. The prisoner is entitled to serve his time promptly, if such is the judgment imposed and he must be deemed to be serving it from the date he is ordered to serve it, and is in the custody of the marshal under its commitment, if, without his fault, the marshal neglects to place him in the proper custody, any other holding would give a marshal, a ministerial officer power more arbitrary and capricious than any known in the law. A prisoner sentenced for one year might thus be required to wait forty under the shadow of his unserved sentence before it pleases the marshal to encarcerate him. Such authority is not even granted to Courts of justice, let alone their ministerial officers. Citation of authority is hardly needed to establish so elementary a proposition. *In re: Jennings* (C.C.). (118 F. 479, 481; *Alburn* v. *United States* (C.C.A. 9) 67 F(2d) 4, 6 and see *White* v. *Pearlman* (C.C.A. 10) 42 F (2d) 788, 789".

The pronouncement in *Smith* v. *Swope* (*supra*) is utterly contrary to the holding of the United States Court of Appeals for the Tenth Circuit as regards this petitioner.

The commitment was specific, clear, concise unequivocal order to the Attorney General to act—which he failed to do—and now he seeks to have his failure to act, charged against this petitioner.

II.

The failure of the Attorney General to follow and utterly disregard the mandate of a Federal District Court, and in effect surrender a prisoner from his jurisdiction to the jurisdiction of one of the States for judicial processes in that State, is in effect an acquiescence on the part of the Attorney General to allow the prisoner, under this prior Federal sentence to serve that Federal sentence with the later to be decided State sentence, under 18 U. S. C. 4082. Concurring of sentencing *i. e.* Federal in State institutions, is spelled out in the matter of *Godwin* v. *Looney* (250 F (2d) 72-74 (Tenth Circuit, 1947).

> "The Federal sentences could not run concurrent with the period of imprisonment he served in the Arkansas Penitentiary *prior to* the imposition of Federal sentence. (Emphasis ours)

In the *Godwin* case the federal sentence did commence to run concurrent with the existing Arkansas sentence from the date of the imposition of the Federal sentence.

This recent case clearly expresses the established doctrine of concurrent federal and State serving of sentences.

Bearing in mind the sentence of the trial court in this matter, the Statutes involved, 18 U. S. C, 4082 and 4068 and the direction of *Smith* v. *Swope, Warden (Supra)*: *Godwin* v. *Looney (Supra)* and the facts involved in this case at bar, the only logical conclusion possible is that the Attorney General, by his surrender of the prisoner, after

his release by the Arkansas Penal Authorities, to the various States' custody and later transportation to those States' legal jurisdiction, and later incarceration in those States, is, that the prior Federal sentence be served concurrent with the later imposed state sentences.

Any other consideration would render the Attorney General with (as said in the *Smith-Swope* (*Supra*) case) a power more arbitrary and capricious than any known in the law.

This is the fundamental holding by the District Court that granted the Writ of Habeas Corpus, *i.e.* that the Attorney General through the factors involved did intend these sentences to all be concurrent with those of the States—*later imposed.*

III.

The Court of Appeals did err in the reversing of the Order of the United States District Court for Kansas, granting a Writ of Habeas Corpus, by interpreting the statutes 18 U. S. C. 3568 and 3582 in an apparent vacuum and not considering any duty of the Attorney General to act to fulfill the valid mandate of the trial court.

If the mandate as expressed in the *Smith* v. *Swope, Warden* case (*Supra*) is not followed by this Honorable Court, the Attorney General and in turn his Marshals; in the exercise of their purely ministered duties, will usurp more description under 18 U. S. C. 3568 than given the Courts. The Attorney General can hang a veritable "Sword of Damocles" over the head of every federal prisoner, regardless of any mandate of the trial Court. It would in effect be putting the ultimate determination of the prisoner incarceration, as to commencement, in the

hands of a mere ministered officer and remove it from the judiciary where it properly belongs.

The commencement of sentence must be sacredly preserved if the orders and sentences of the trial courts are to remain in as much esteem as they presently bask.

The pronouncement of the trial court is by its nature an order not be be questioned by an officer of the Attorney General. If the Attorney General feels the sentence is uncertain or impossible to fulfill, he then has a duty to attack the sentence. Here this was not done. The sentence was clear to the Attorney General or at least it should have been. He nevertheless did not follow the order issued and therefore under the *Smith* case (*Supra*) the Federal sentences have been served concurrent with the later imposed State sentences.

Therefore to follow a Statute to the bare and naked letter, without considering the factors that led up to the application of that statute, is error on the part of a Court of Justice. Here the petitioner feels if the allied factors are considered and then the letter of the statute be followed. The judgment of the Court of Appeals should have been to affirm the order of the District Court granting the Writ of Habeas Corpus.

CONCLUSION.

The Court of Appeals by the simple consideration of the Statutes involved and basing its decision on the cases if did *Rahr* v. *Hudspeth*, 105 Fed. (2d) 747; *McIntosh* v. *Looney*, 249 F. (2d) 62; *Harrell* v. *Shuttleworth*, 200 F. (2d) 490 and finally *Gardner* v. *United States*, 274 F. (2d) 380; the factual situation and circumstances of which so greatly differed from those of the petitioner here, that they form little basis for deciding as it did.

Therefore:

A writ of Certiorari should be granted.

Respectfully submitted.

ROBERT F. MOORE,
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APPENDIX.

(October 19, 1960)

David Rubin (Joseph M. F. Ryan, Jr., Acting Assistant Attorney General; Wilbur G. Leonard, United States Attorney; Harold H. Greene and Gerald P. Choppin, Attorneys, Department of Justice, were with him on the brief) for Appellant.

Robert F. Meersman and Robert F. Moore for Appellee.

Before MURRAH, *Chief Judge*, and BRATTON and PICKETT, *Circuit Judges*.

BRATTON, *Circuit Judge*.

This proceeding in habeas corpus was instituted in the United States Court for Kansas by Orie Floyd Baker, hereinafter referred to as petitioner, to effectuate his discharge from further confinement in the federal penitentiary at Leavenworth, Kansas. And the crucial question upon which the case turns is whether service of three sentences imposed upon petitioner by the United States Court for Eastern Arkansas began at the time he was released from the state penitentiary in Arkansas or at the time he was paroled from the state prison in Wisconsin and delivered to the federal authorities for service to the federal authorities for service of the federal sentences.

The facts constituting the background of the case were stated in detail in *United States* v. *Baker*, 158 F. Supp. 842; *United States* v. *Baker*, 170 F. Supp. 651; and *Baker* v. *United States*, 271 F.(2d) 190. But for present purposes it is enough to say that the case has its genesis in these facts. Petitioner entered pleas of guilty in three cases pending in the United States Court for Eastern Arkansas and was sentenced to a term of five years in each case, with provision that the sentences should run

concurrently with each other. At the time these sentences were imposed, petitioner was serving a term in the penitentiary in Arkansas. The sentences imposed in the United States Court each provided that it should "begin at the expiration of the sentence said defendant is now serving in the Arkansas State penitentiary . . ." After imposition of these sentences, petitioner was returned to the state penitentiary in Arkansas to complete the service of his sentence there. Upon completion of that sentence, he was released to the custody of authorities of Indiana and was returned to that state for completion of a sentence in the state reformatory there. When petitioner completed his sentence in Indiana, he was turned over to authorities of Wisconsin for service of sentences in the penitentiary of that state. And he was finally delivered to the federal authorities for service of the sentences imposed upon him by the United States Court for Eastern Arkansas. If service of the sentences which the United States Court imposed upon petitioner began at the time he completed his sentence in the penitentiary of Arkansas, and if he were credited with the maximum statutory time for good behavior, he was eligible for conditional release prior to the time of the filing of this action in habeas corpus. On the other hand, if such sentences were computed from the time petitioner was delivered to the federal authorities for their service, he was not eligible for conditional release. Expressing the view that service of the three sentences which petitioner received in the United States Court for Eastern Arkansas began at the expiration of the sentence served in the penitentiary of Arkansas, the court granted the writ of habeas corpus and ordered petitioner discharged. The warden appealed.

The time at which a sentence in a criminal case shall begin to run is the subject matter of 18 U.S.C. §3568. The statute provides:

> "The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory,

or jail for service of said sentence. If any such person shall be committed to a jail or other place of detention to wait transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

And the statute has been considered with care in this court and elsewhere. In *Rohr* v. *Hudspeth*, 105 F.(2d) 747, petitioner had been in custody for an alleged violation of state law. While in such custody, he was produced in the United States Court; he pleaded guilty; and he was sentenced to imprisonment for a term of five years "from this date" in the penitentiary. Slightly more than a month later, he was tried on the state charge. The jury was unable to agree; at a later date the case was removed from the docket; and petitioner was turned over to the Marshal for delivery to the penitentiary for service of the five-year sentence. It was the contention of the petitioner that since the sentence expressly provided that it was to run from its date, it began to run on that date rather than the date he was delivered to the Marshal. Predicating its conclusion upon the command of the statute, this court rejected the contention and held that the sentence did not begin to run until the date on which petitioner was delivered to the Marshal. In *McIntosh* v. *Looney*, 249 F.(2d) 62, certiorari denied, 355 U.S. 935, petitioner had been confined in a county jail in Missouri serving a sentence of six months for a violation of state law. While so confined, he was produced in the United States Court for the imposition of sentence for a violation of federal law. A sentence of five years imprisonment was imposed to "begin to run upon the expiration of the sentence of imprisonment imposed by the state court and now being served." While continuing to serve the sentence of six months in jail, petitioner assaulted a jailer; was indicted; pleaded guilty; and was sentenced to imprisonment for a term of five years, with provision in the

sentence that it "should begin at the expiration of a sentence in the Green County, Missouri, jail." On the expiration of the six-month term in jail, petitioner was removed to the state penitentiary where he was imprisoned pursuant to the sentence upon the charge of assaulting the jailer. Upon release from the state penitentiary, he was surrendered to federal authority for service of the sentence imposed upon him by the United States Court. It was the contention of petitioner that the five-year sentence imposed upon him by the United States Court began to run at the expiration of a six-month sentence served in the county jail. Again citing the statute, *supra*, this court held that under its command the sentence imposed upon petitioner by the United States Court did not begin to run at the expiration of the sentence of six months in the county jail; and that instead, it began to run at the same time he was actually delivered to federal authority for imprisonment. The case of *Harrell* v. *Shuttleworth*, 200 F.(2d) 490, was quite similar. There, petitioner had been confined in the state penitentiary of Florida for service of a sentence of six years. While serving such sentence, he was produced in the United States Court where he pleaded guilty to a criminal charge and was sentenced to imprisonment for a term of two years "to begin at expiration of sentence defendant is now serving in the Florida State Prison." Petitioner was returned to the state prison where he continued to serve the six-year term in that institution. Thereafter, while still serving such sentence, he assaulted a person. A criminal charge was filed against him in the state court; he pleaded guilty thereto; and he was committed to the state penitentiary for a term of six years. When petitioner completed service of the first sentence in the state penitentiary, he remained there to serve the second commitment to that institution. When petitioner was released from the state penitentiary, he was taken into custody for service of the federal sentence. He contended that by the express terms of the federal sentence, it began to run at the expiration of the first sentence to the state penitentiary, rather than at the time he was actually de-

livered to federal authorities. The court found itself unable to share that view. Citing the statute, *supra*, it was held that the sentence imposed by the United States Court began to run at the time petitioner was actually taken into custody for its service, not at the conclusion of the first sentence served in the state penitentiary. And in *Gardner* v. *United States*, 274 F.(2d) 380, a like question was presented in fairly comparable circumstances. There, while petitioner was serving a term of imprisonment in the state penitentiary, he was convicted in the United States Court and was sentenced to imprisonment for one year "to begin at the completion of service of sentence now being served in the South Carolina penitentiary." While still in the state penitentiary, petitioner twice attempted to escape; was convicted; and was given two sentences of six months each to run consecutively. He served his time for the sentence he was under at the time he was convicted in the United States Court, and he also served the two sentences of six months each. He was taken into custody for service of the sentence which the United States Court imposed upon him. He contended that the federal sentence began to run at the expiration of the first sentence in the state penitentiary; that more than a year had expired since he completed service of the first sentence in the state penitentiary; that, therefore, the term of his federal sentence had expired; and that accordingly, he was entitled to be discharged. Citing the statute, *supra;* citing *McIntosh* v. *Looney, supra;* and citing *Harrell* v. *Shuttleworth, supra*, it was held in effect that the federal sentence began to run at the time petitioner was taken into custody for service thereof. When the question is viewed in the light of the mandate contained in the statute, and in the light of the unanimity of conclusion reached in the cases to which reference has been made, we think it is clear that the sentence imposed upon petitioner by the United States Court in Arkansas began to run at the time he was actually delivered into federal custody for service of such sentence rather than at the completion of service of the sentence in the penitentiary of Arkansas.

The judgment is reversed and the cause is remanded with directions to deny the petition for writ of habeas corpus and restore petitioner to the custody of the warden.

Judgment

Twenty-Fourth Day, September Term, Wednesday, October 19th, 1960.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Sam G. Bratton and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with directions to deny the petition for a writ of habeas corpus and restore petitioner to the custody of the warden.

Order denying petition for rehearing

Thirty-ninth Day, September Term, Thursday, November 10th, 1960.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Sam G. Bratton and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

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No. 598

In the Supreme Court of the United States

OCTOBER TERM, 1960

ORIE FLOYD BAKER, PETITIONER

v.

J. C. TAYLOR, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Neither the order of the District Court nor the opinion of the Court of Appeals (Pet. App. 1a–6a) is reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1960 (Pet. App. 6a). A timely petition for rehearing was denied on November 10, 1960 (Pet. App. 6a). The petition for a writ of certiorari was filed on December 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a federal court has power to make a federal sentence run concurrently with a state sentence in a state institution, in the absence of any

action by the Attorney General designating the state institution as the place for service of the federal sentence.

2. Whether the sentencing court in this case intended that petitioner's federal sentences should run concurrently with sentences to be served in other states subsequent to the expiration of the state sentence he was then serving.

STATUTES INVOLVED

18 U.S.C. 3568 provides:

> *Effective date of sentence.*—The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence.
>
> If any such person shall be committed to a jail or other place of detention to wait transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> No sentence shall prescribe any other method of computing the term.

18 U.S.C. 4082 provides:

> *Commitment to Attorney General; transfer.*—Persons convicted of an offense against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences shall be served.
>
> The Attorney General may designate any

available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted.

The Attorney General may order any inmate transferred from one institution to another.

* * * * *

STATEMENT

On June 14, 1955, following his plea of guilty to indictments charging violations of 18 U.S.C. 500 (uttering forged post office money orders), 18 U.S.C. 1708 (mail theft), and 18 U.S.C. 495 (forging an endorsement to a United States treasury check), petitioner was sentenced by the District Court for the Eastern District of Arkansas, Western Division, in Criminal Cases No. 15758, 15759, and 15765, to be committed to the custody of the Attorney General for a period of five years in each case, the sentences to be served concurrently. At the time of sentencing, petitioner was serving a two-year sentence in the State of Arkansas Penitentiary and was before the federal court on a writ of habeas corpus ad prosequendum. The sentencing judge stated in his order in each of the cases that the sentence imposed was to begin "at the expiration of the sentence said defendant is now serving in the Arkansas State Penitentiary."

Upon his release from the Arkansas Penitentiary on December 10, 1955, petitioner was taken into custody by officials of the State of Indiana pursuant to a detainer which had been filed on March 12, 1954. (The federal detainer was not filed until March 31, 1954.) After his discharge from the Indiana Re-

formatory on December 12, 1956, petitioner was taken into custody by the Sheriff of Kenosha, Wisconsin, pursuant to detainers filed by that state with Arkansas and Indiana prior to the federal detainers. He was sentenced by the Municipal Court of Kenosha, Wisconsin, to a term of from one to three years in the Wisconsin State Prison. On May 2, 1958, petitioner was paroled from Wisconsin, and he was then committed to the United States Penitentiary at Leavenworth, Kansas, on May 13, 1958, for service of his federal sentences.

On November 24, 1959, while confined in the Leavenworth Penitentiary, petitioner filed with the District Court for the District of Kansas a petition for a writ of habeas corpus,[1] in which he asserted that his federal sentences had run concurrently with the state sentences which he had served in Indiana and Wisconsin. In support of this contention, he alleged that, when the sentencing court stated that each federal sentence was to begin at the expiration of the sentence petitioner was then serving in the Arkansas State Penitentiary, it intended that the federal sentence be served concurrently with all subsequent state sentences.

If petitioner's federal sentences commenced to run on December 10, 1955 (when he was released from the Arkansas prison), and if he were credited with the maximum statutory good time of 480 days, he would have been eligible for conditional release from

[1] For prior proceedings, see *United States* v. *Baker*, 158 F. Supp. 842 (E.D. Ark.); *United States* v. *Baker*, 170 F. Supp. 651 (E.D. Ark.), affirmed, 271 F. 2d 190 (C.A. 8).

Leavenworth on August 17, 1959. If his sentences were computed from May 2, 1958, the date on which he was released from Wisconsin State Prison, he would not be eligible for conditional release until January 6, 1962.

In the present habeas corpus proceeding, the District Court appointed counsel to represent petitioner. Respondent filed a return to the petition, and the matter was heard on December 8, 1959. The court concluded that the federal sentences ran concurrently with the state sentences which followed the Arkansas sentence and ordered petitioner to be conditionally released on December 28, 1959.

On appeal, the Court of Appeals for the Tenth Circuit reversed, holding that the time of commencement of a federal sentence is governed by 18 U.S.C. 3568; that under that section petitioner's sentence began to run at the time he was actually delivered into federal custody for service of his sentence, and not when he was released from the Arkansas penitentiary.

ARGUMENT

1. Under 18 U.S.C. 3568 (*supra*, p. 2), a federal sentence "shall commence to run from the date on which [the defendant] is received at the penitentiary, reformatory, or jail for service of said sentence." Relying upon plentiful authority in the federal courts, the Court of Appeals correctly held that under this statute, irrespective of the sentencing court's intent, petitioner's sentence began to run only when he came into federal custody. *E.g.*, *McIntosh* v. *Looney*, 249 F. 2d 62 (C.A. 10); *Rohr* v. *Hudspeth*, 105 F. 2d 747

(C.A. 10); *Gardner* v. *United States*, 274 F. 2d 380 (C.A. 5); *Harrell* v. *Shuttleworth*, 200 F. 2d 490 (C.A. 5). The court fixes the term of the sentence; the law names the time of its commencement. Language of a sentencing judge which attempts to fix the time of commencement of a sentence will be regarded as surplusage. *Rohr* v. *Hudspeth*, *supra*.

Similarly, the sentencing judge lacked power to designate the Indiana and Wisconsin institutions for service of petitioner's federal sentences (assuming that the judge purported to do so). It is well settled that designation of the place of confinement is a function vested in the Attorney General under 18 U.S.C. 4082 (*supra*, pp. 2–3), and language of a sentencing judge attempting so to designate is inoperative. *Bateman* v. *United States*, 277 F. 2d 65 (C.A. 8); *Montos* v. *United States*, 261 F. 2d 39 (C.A. 7).

In *Smith* v. *Swope*, 91 F. 2d 260 (C.A. 9), upon which petitioner relies, the defendant was sentenced by a federal court and turned over to a United States Marshal who, in disobedience of the judgment and commitment, released him to state authorities for plea and sentencing. The court held that the defendant could not be charged with the failure of the Marshal, who had exclusive custody of the defendant, to execute his ministerial duty to place the prisoner in the proper federal custody. The case is thus distinguishable from the present one, in which the Marshal, under the prevailing rules of comity governing state prisoners brought to federal courts on writs of habeas corpus ad prosequendum, was obliged to return petitioner to the Arkansas authorities after his federal

sentences had been imposed. *Lunsford* v. *Hudspeth*, 126 F. 2d 653 (C.A. 10). The Attorney General's authority is not ministerial but discretionary, for under 18 U.S.C. 4082 he must determine whether the state institution is "suitable" or "appropriate" for service of the federal sentence, *i.e.*, he must decide whether the facilities of the state institution are sufficient to satisfy federal reform and rehabilitative standards. He did not so decide here.

2. The judgment of the Court of Appeals was correct for the additional reason that the sentencing court did not intend petitioner's federal sentences to run concurrently with the Indiana and Wisconsin sentences. The sentencing judge was specific in stating that each of the federal sentences was to run concurrently with each other. If concurrency with the state sentences were intended by the judge, he would have said so specifically. Moreover, the fact that the court clearly did not wish the federal sentences to begin at once (while petitioner was serving his Arkansas term) demonstrates that concurrency with state sentences was not the court's aim; and, finally an intention to render its own sentence practically nugatory by having it run concurrently with sentences imposed by state courts for unrelated offenses should not be imputed by inference to a federal court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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